IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff v. WESTINGHOUSE ELECTRIC CORPORATION and INFINITY BROADCASTING CORPORATION, Defendants.	Civil No. 1: 96CV02563 (NHJ) (Antitrust)

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Plaintiff filed a civil antitrust Complaint on November 12, 1996, alleging that the proposed acquisition of the Infinity Broadcasting Corporation ("Infinity") by the Westinghouse Electric Corporation ("Westinghouse") would violate Section 7 of the Clayton Act, 15 U.S.C.

§ 18. The Complaint alleges that Westinghouse and Infinity own and operate numerous radio stations throughout the United States, and that they each own and operate radio stations in the Philadelphia, Pennsylvania and Boston, Massachusetts metropolitan areas. This acquisition would give Westinghouse control over more than 40 percent of the radio advertising revenues in those metropolitan areas, as well as a substantial amount of control over access to certain demographic groups of radio listeners targeted by advertisers in those metropolitan areas. As a result, the combination of these companies would substantially lessen competition in the sale of radio advertising time in the Philadelphia and Boston metropolitan areas.

The prayer for relief seeks: (a) adjudication that Westinghouse's proposed acquisition of Infinity would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed acquisition; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits Westinghouse to complete its acquisition of Infinity, yet preserves competition in the markets in which the transaction would raise significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed with the Court at the same time the Complaint was filed.

The proposed Final Judgment orders Westinghouse to divest WMMR-FM, currently owned by Westinghouse, and WBOS-FM, currently owned by Infinity, in Philadelphia and Boston, respectively. Unless the United States grants an extension of time, Westinghouse must divest these radio stations within six months after the filing of the Final Judgment, or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If

Westinghouse does not divest these stations within the divestiture period, the Court may appoint a trustee to sell the assets. The proposed Final Judgment also requires the defendants to ensure that, until the divestitures mandated by the Final Judgment have been accomplished, WMMR-FM and WBOS-FM will be operated independently as viable, ongoing businesses, and kept separate and apart from Westinghouse's and Infinity's other Philadelphia and Boston radio stations, respectively. Further, the proposed Final Judgment requires the defendants to give plaintiff prior notice regarding future radio station acquisitions in Philadelphia and Boston.

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. THE ALLEGED VIOLATION

A. The Defendants

Westinghouse is a Pennsylvania corporation headquartered in Pittsburgh, Pennsylvania. It currently owns, through its subsidiary CBS Inc., 41 radio stations in 13 metropolitan areas across the United States, including four located in the Philadelphia metropolitan area and two located in the Boston metropolitan area. Westinghouse's four radio stations in the Philadelphia area are KYW-AM, WMMR-FM, WOGL-FM and WPHT-AM; its two radio stations in the Boston area are WBZ-AM and WODS-FM. In 1995, its revenues from its Philadelphia stations were approximately $55,300,000, and its revenues from its Boston stations were approximately $26,600,000.

Infinity is a Delaware corporation headquartered in New York, New York. Infinity owns 42 radio stations in 13 metropolitan areas across the United States, including two located in the Philadelphia metropolitan area and four located in the Boston metropolitan area. Infinity's two radio stations in the Philadelphia area are WYSP-FM and WIP-AM; its four radio stations in the Boston area are WBCN-FM, WZLX-FM, WBOS-FM and WOAZ-FM. In 1995, its revenues from its Philadelphia stations were approximately $31,500,000, and its revenues from its Boston stations were approximately $46,000,000.

B. Description of the Events Giving Rise to the Alleged Violation

On June 20, 1996, Westinghouse agreed to purchase Infinity for approximately $4.9 billion. As is more fully discussed below, Westinghouse would control more than 40 percent of the radio advertising revenues in Philadelphia and in Boston, and could exercise substantial control over access to certain target audiences sought by advertisers in those metropolitan areas. The proposed acquisition by Westinghouse of Infinity, and the threatened loss of competition that would be caused thereby, precipitated the Government's suit.

C. Anticompetitive Consequences of the Proposed Merger

1. Sale of Radio Advertising Time In the Philadelphia and Boston MSAs.

The Complaint alleges that the provision of advertising time on radio stations serving the Philadelphia, Pennsylvania Metro Survey Area ("MSA") and the Boston, Massachusetts MSA each constitute a line of commerce and section of the country, or relevant market, for antitrust purposes. These MSAs are the standard geographical units for which Arbitron furnishes radio stations, advertisers and advertising agencies in Philadelphia and Boston with data to aid in evaluating radio audience size and composition. Local and national advertising that is placed on

radio stations within the Philadelphia and Boston MSAs is aimed at reaching listening audiences in those MSAs, and radio stations outside of those MSAs do not provide effective access to those audiences. Thus, advertisers would not buy enough advertising time from radio stations located outside of the Philadelphia MSA to defeat a small but significant non-transitory increase in radio advertising prices within that MSA. Likewise, advertisers would not buy enough advertising time from radio stations located outside of the Boston MSA to defeat a small but significant non-transitory increase in radio advertising prices within that MSA.

Radio advertising time is sold by radio stations directly or through their national representatives. Radio stations generate almost all of their revenues from the sale of advertising time to local and national advertisers.

Many local and national advertisers purchase radio advertising time in Philadelphia and Boston because they find such advertising preferable to advertising in other media to meet certain of their specific needs. For such advertisers, radio time: may be less expensive and, on a per-dollar basis, more cost-efficient than other media at reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); may reach certain target audiences that cannot be reached as effectively through other media; or may offer promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these reasons, many local and national advertisers in Philadelphia and Boston who purchase radio advertising time view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media.

Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in radio advertising time in Philadelphia and

Boston, the existence of such advertisers would not prevent radio stations from profitably raising their prices a small but significant amount. At a minimum, stations could profitably raise prices to those advertisers who view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media. Radio stations, which negotiate prices individually with advertisers, can identify those advertisers with strong radio preferences. Consequently, radio stations can charge different advertisers different rates. Because of this ability to price discriminate between different customers, radio stations may charge higher prices to advertisers that view radio as particularly effective for their needs, while maintaining lower prices for other advertisers.

2. Harm to Competition

The Complaint alleges that Westinghouse's proposed acquisition of Infinity would lessen competition substantially in the provision of radio advertising time in the Philadelphia and Boston MSAs. Westinghouse presently controls approximately 28 percent of all radio advertising revenues in Philadelphia and approximately 15 percent of all radio advertising revenues in Boston. Infinity presently controls approximately 16 percent of all radio advertising revenues in Philadelphia and more than 25 percent of all radio advertising revenues in Boston. Westinghouse's market shares would rise to approximately 45 percent in Philadelphia and to more than 40 percent in Boston after the proposed merger. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Exhibit A annexed hereto, the pre-merger HHI in Philadelphia is approximately 1876, which would rise to 2800 after the merger, with a change of about 924. In Boston, the pre-merger HHI is approximately 1875, which would rise to 2638 after the merger, with a change of about 763.

These substantial increases in concentration are likely to reduce competition and lead to higher prices and lower quality of service in each of these markets.

Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, inter alia, the size of the station's audience and whether the characteristics of its audience have a high correlation to the target audience of the advertisers. If a number of stations efficiently reach that target audience, advertisers benefit from the competition among such stations, which leads to better prices and services. Today, several Westinghouse and Infinity stations compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Philadelphia and Boston, they are close substitutes for each other based on their specific audience characteristics. The proposed merger would eliminate this competition, most critically affecting advertisers seeking to reach male listeners between the ages of 18 and 54 in Philadelphia and Boston.

During individual price negotiations between advertisers and radio stations, advertisers provide the stations with information about their advertising needs, including their target audience and the desired frequency and timing of ads. Radio stations thus have the ability to charge advertisers differing prices after assessing the number and attractiveness of alternative radio stations that can meet a particular advertiser's specific target audience needs.

In Philadelphia and Boston, advertisers that must reach male listeners within certain age ranges can help ensure competitive rates by "playing off" Infinity stations against Westinghouse stations. Because the direct competition between the Westinghouse and the Infinity stations would be eliminated by the proposed merger, and because advertisers seeking to reach male listeners between the ages of 18 and 54 would have inferior alternatives to the merged entity, the

acquisition would give Westinghouse the ability to raise prices and reduce quality. This is particularly true because of the merged entity's ability to charge different prices to different advertisers.

If Westinghouse raised prices or lowered services to those advertisers who buy time on Westinghouse and Infinity stations because of their strength in delivering access to certain audiences, non-Westinghouse radio stations in Philadelphia and Boston would not be induced to change their formats to attract those audiences in sufficiently large numbers to defeat a price increase. Successful radio stations are unlikely to undertake a format change solely in response to small but significant increases in price being charged to advertisers by a multi-station firm such as Westinghouse, because they would likely lose a substantial portion of their existing audiences. Even if less successful stations did change format, they would still be unlikely to attract enough listeners to provide suitable alternatives to the merged entity.

New entry into the Philadelphia and Boston radio advertising markets is highly unlikely in response to a price increase by the merged entity. No unallocated radio broadcast frequencies exist in Philadelphia and Boston. Also, stations located in adjacent communities cannot boost their power so as to enter the Philadelphia and Boston MSAs without interfering with other stations on the same or similar frequencies, a violation of Federal Communications Commission ("FCC") regulations.

For these reasons, the plaintiff concludes that the merger as proposed would substantially lessen competition in the sale of radio advertising time in the Philadelphia and Boston MSAs, eliminate actual competition between Westinghouse and Infinity, and result in increased prices and reduced quality of service for buyers of radio advertising time in those markets, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in the Philadelphia and Boston MSAs. It requires the divestiture of WMMR-FM in Philadelphia and WBOS-FM in Boston. The divestitures will preserve choices for advertisers, particularly for those seeking to reach male listeners between the ages of 18 and 54. They will also help ensure that radio advertising rates do not increase and that services do not decline in Philadelphia and Boston as a result of the acquisition. This relief will reduce the market share Westinghouse would have achieved through the merger from about 45 percent to about 37 percent in the Philadelphia MSA, and from over 40 percent to about 36.5 percent in the Boston MSA.

Unless the United States grants an extension of time, defendants must divest WMMR-FM and WBOS-FM within six months after the Final Judgment has been filed, or within five (5) business days after notice of entry of this Final Judgment, whichever is later. Until the divestitures take place, these stations, now owned by Westinghouse and Infinity, respectively, will be maintained as independent competitors to the other stations in the Philadelphia and Boston MSAs, respectively, including the other Westinghouse and Infinity stations in those markets.

If Westinghouse fails to divest either or both of these stations within the time period specified in the Final Judgment, or any extension thereof, the Court, upon application of the plaintiff, shall appoint a trustee nominated by the plaintiff to effect the required divestiture or divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of WMMR-FM and WBOS-FM, and shall be based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished. After appointment, the trustee will file monthly reports with the plaintiff, the defendants and the Court, setting forth the trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the trustee has not accomplished the divestitures within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations consistent with the purpose of the trust.

The proposed Final Judgment requires that defendants maintain WMMR-FM and WBOS-FM separate and apart from their other stations, pending divestiture. The Judgment also contains provisions to ensure that these stations will be preserved, so that they will remain viable, aggressive competitors after divestiture.

The proposed Final Judgment also requires defendants to notify the plaintiff before acquiring any significant interest in another Philadelphia or Boston radio station. Such acquisitions could raise competitive concerns but might be too small to be otherwise reported under the Hart-Scott-Rodino ("HSR") premerger notification requirements.

Moreover, defendants are also required to notify the plaintiff before they enter into any Joint Sales Agreements ("JSAs"), where one station takes over another station's advertising time, or enter into any Local Marketing Agreements ("LMAs"), where one station takes over another station's broadcasting and advertising time, or any other comparable arrangements, in the Philadelphia or Boston areas. Agreements whereby defendants sell advertising for or manage other Philadelphia or Boston area radio stations would effectively increase their market share in such MSA. Despite their clear competitive significance, JSAs probably would not be reportable to the plaintiff under the HSR Act. Thus, this provision in the decree ensures that the plaintiff will receive notice of, and be able to stop, any agreements that could have anticompetitive effects in the Philadelphia or Boston markets.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of the proposed acquisition of Infinity by Westinghouse. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or bring actions, where appropriate, challenging other past or future activities of defendants in the Philadelphia and Boston MSAs, including their entry into any JSAs, LMAs or any other agreements related to the sale of advertising time.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the plaintiff has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the plaintiff written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. The comments and the response of the plaintiff will be filed with the Court and published in the Federal Register.

Any such written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. The plaintiff is satisfied, however, that the divestiture of WMMR-FM and WBOS-FM and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Philadelphia and Boston MSAs. Thus, the proposed Final Judgment would achieve the relief the Government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration

> or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

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[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on

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[2]Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ") (citations omitted).

its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' "[3]

This is strong and effective relief that should fully address the competitive harm posed by the proposed merger.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the plaintiff in formulating the proposed Final Judgment.

Respectfully submitted,

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Dando B. Cellini

Merger Task Force
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W.; Suite 4000
Washington, D.C. 20530
(202) 307-0829

Dated: November 15, 1996

[3]United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

EXHIBIT A

DEFINITION OF HHI AND CALCULATIONS FOR MARKET

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. See *Merger Guidelines* § 1.51.

Certificate of Service

I, Dando B. Cellini, hereby certify that, on November 15, 1996, I caused a copy of the foregoing Competitive Impact Statement filed this day in United States v. Westinghouse Broadcasting Corporation and Infinity Broadcasting Corporation, Civil Action No. 1:96CV02563 (NHJ), to be served on defendants Westinghouse Broadcasting Corporation and Infinity Broadcasting Corporation by having a copy mailed, first class, postage prepaid, to:

Joe Sims
Jones, Day, Reavis & Pogue
1450 G St., N.W.
Washington, D.C. 20005
Counsel for Westinghouse Electric Corporation

Daniel M. Abuhoff
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022
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_____
Dando B. Cellini

Dated: November 15, 1996